In the Matter of the Stipulation of

LACROSSE COUNTY

and

LACROSSE COUNTY HIGHWAY AND PARKS DEPARTMENT EMPLOYEES, LOCAL 227, WCCME, AFSCME, AFL-CIO

Decision No. 19646-A

INTRODUCTION

LaCrosse County (hereafter Employer) and the LaCrosse County Highway and Parks Department Employees, Local 227, WCCME, AFSCME, AFL-CIO (hereafter Union) were unable to reach agreement on a collective bargaining agreement and stipulated to the initiation of mediation-arbitration pursuant to Sec. 111.70(4)(cm) of the Municipal Employment Relations Act. Arlen Christenson of Madison, Wisconsin was appointed mediator-arbitrator. After an unsuccessful attempt at mediation an arbitration hearing was held at LaCrosse, Wisconsin on July 1, 1982, at which both parties had full opportunity to present evidence and argument. Post hearing briefs were received by the arbitrator by July 21, 1982.

APPEARANCES

K. E. Guthrie, Personnel Director, represented the Employer.

Daniel R. Pfeifer, District Representative, represented the Union.

DISCUSSION

The conflicting final offers propose changes in four sections of the agreement. The Union proposes a change in Section 8.01 pertaining to vacations. The Employer also proposes a modification of Section 8.01 and, in addition, its final offer would amend Sections 4.04, 6.01 and 9.02. The discussion which follows will consider each section separately.

Section 4.04

The Employer's final offer provides that Section 4.04 be amended by the addition of the underlined language to make the section read as follows:

> No new employee shall be hired while there are seniority employees on the layoff list, except as provided in Section 4.03.

The Employer argues that the additional language is necessary "to preclude the need . . . to recall all laid off employees in order to hire a qualified person for a specific job in the event one of the laid off persons is not qualified." The Employer describes the present language as a "featherbedding" provision forcing the Employer to hire people it does not need before it can fill a critical vacancy.

The Union contends that the new language would open the door for unilateral determinations by the Employer that laid off employees are not qualified. Moreover, the Union argues, the Employer has not shown "that the current language has been detrimental to its operations in the past." In the absence of such a showing an arbitrator should not modify negotiated language. Finally the Union argues that the majority of collective bargaining agreements in comparable bargaining units do not contain the kind of language proposed by the Employer.

The Employer's objective seems clearly legitimate. It ought not be necessary to recall several unneeded employees in order to gain the right to hire a new employee in a skilled position. It is not clear, however, that the language of the Employer's offer is either necessary or appropriate to achieve this goal. It may not be necessary because if Section 4.04 is read, as it must be, in conjunction with Sections 4.03, 4.05 and 4.06, the Agreement may now provide that laid off employees need be recalled only if they are qualified to fill the vacant position. It may not be appropriate because the reference to all

of Section 4.03 as part of the exception creates a very difficult problem in interpretation. Does the term "for which he may qualify" mean that a laid off employee is entitled to a trial period before being bypassed or not? Section 4.06 suggests he might. What is the effect of the language in 4.03 limiting its entitlement to those laid off within one year? Such ambiguities make the inclusion of the language in the Agreement highly problematical.

Section 6.01

The Employer's final offer would amend Section 6.01 to read as follows:

> In the event of layoff due to lack of work, economic cutbacks, except acts of nature and emergency situations not within the control of the County, the reduction of forces is to be accomplished by: first, layoff of temporary, part-time, and provisional employees; second, those full-time employees in the department with the least amount of seniority, except those whose special skills cannot be replaced by a more senior employee. Regular full-time employees subject to layoff may elect to displace a junior employee in another classification at the same or lower level providing that said senior employee has the training and experience to perform the work available, except that in the case of layoff due to acts of nature and emergency situations not within the control of the County, the County may immediately layoff those persons so affected by said conditions. Notice of reduction in forces due to lack of work, or economic cutbacks, shall be given two (2) weeks prior to the effective date of layoff. Notice of election to displace must be made within one (1) calendar week after notification of reduction of forces, thereby granting the displaced person one (1) week notice of displacement.

The Employer's primary interest in proposing this change is "to accommodate those occasions where the weather may shut down operations in one part of the County, but not in the other part or parts." In such situations the "Union has previously argued that when one crew is sent home, the whole department should be shut down." The problem the Employer sees is that all layoffs must now be in order of seniority regardless of their cause. The result is that it is very difficult for the Employer to respond to weather conditions which make it impossible to work.

Senior employees who happen to be working where the bad weather hits cannot be sent home temporarily.

The Union argues that the Employer's proposal disregards the importance of seniority as a governing principle. "Second, the County has not shown that the current language is or has been detrimental to its operation. Third, and most important, the County has produced no comparables . . . Union exhibits . . . show that no comparable language exists in comparable Counties. Therefore, the arbitrator, if selecting the County's offer, would be instituting new language and a novel approach to lay-off."

In this instance, as in its proposal for modification of Section 4.04, the Employer has identified a problem, or a potential problem that might appropriately be dealt with in the Agreement. The specific provision embodied in the Employer's final offer, however, may create more problems than it solves. It permits layoffs without regard to seniority if the layoff is due to "acts of nature and emergency situations not within the control of the County." The language includes layoffs due to weather conditions but it also includes many other circumstances not contemplated by the Employer's arguments. Strikes against suppliers, failures in transportation, shortages of raw materials and many other similar events might be considered "emergency situations not within the control of the County." The term "acts of nature" include happenings other than inclement weather. In short, the provision is too broadly drawn to meet the problem identified by the Employer.

Section 8.01

The parties have agreed that Section 8.01 should be amended to provide for 5 weeks of vacation for some employees. The Employer's final offer, however, would require 25 years of service before an employee would be eligible for the 5 weeks while the Union final offer would begin eligibility at 22 years.

The Employer's arguments on the issue are summarized in it brief as follows:

> Section 8.01.01.5 - Vacation - It is the County's position that its proposal of granting five weeks predicated on 25 years of active employment is reasonable and meets the tests of comparability as supported by its Exhibit No. VI based upon a survey conducted May, 1982, substantiates the County's position. We call the arbitrator's attention to the notes which show that of the 16 counties responding, all of which are comparable population-wise or contiguous to La Crosse County. Seven do not even provide five weeks of vacation, five or over half granted only upon 25 years of service. The County wishes to emphasize that the County's proposal will provide 13 of the employees covered by the Agreement with an additional week of vacation. It should be noted that this is equal to the loss of one person for a period of one quarter of a year. On the issue of proration, it is the Company's position that there was no compelling reason to grant this in view of this being the first time that five weeks vacation would be provided. Further, the Union's proposal on proration in effect increases the amount of vacation time granted in the first year of the Agreement. We feel that the issue or proration has been unfairly presented inasmuch as this issue had never been on the table in prior negotiations with the Union. In accordance with the County's computation, the issue of proration would add an additional three weeks of vacation in total.

The Union, using a different set of comparable counties, calculates that nine of eleven have 5 weeks of vacation with the average number of years for eligibility being 22.67. This, the Union argues, suggests that its proposal for eligibility at 22 years is more reasonable than the Employer's proposal of 25 years. The Union also emphasizes two other differences between the final offers. First the Union's offer calls for pro-rating vacation benefits for employees with 23 years or more of service during 1982. Secondly the Employer's final offer makes the five week vacation provision contingent upon the Union's agreement not to request three weeks of vacation after five years of service in the next contract negotiations.

Upon reviewing the evidence, including the comparables provided by both parties, I conclude that the Employer's final offer requiring 25 years of service to earn 5 weeks of vacation

is the more reasonable in terms of eligibility. Twenty-five years seems more in line with comparable counties and more appropriate in view of the circumstances in other bargaining units in the County. I am troubled, however, by the provision of the final offer that this contract term is contingent upon the Union's agreement not to seek 3 weeks of vacation after 5 years of service in the next negotiations. I see problems with enforcement of such a provision and such an advance limitation on collective bargaining flexibility seems unwise.

Section 9.02

The Employer's final offer provides for the amendment of Section 9.02 by the addition of the underlined language to read as follows:

> Employees shall not be required to furnish doctor's certification to substantiate approval of sick leave unless the period of absence from duty exceeds three consecutive days' duration, except that if more than four (4) days in a four (4) week period are claimed, than a physician's statement or other acceptable proofs of illness shall be required. It is further provided that if two (2) days or more are claimed prior to, or succeeding, a holiday, weekend, or vacation, or prior to termination of employment, then satisfactory proof of illness must be provided before payment will be made for such claimed days.

The Employer points to "abuses" of sick leave, particularly by employees nearing retirement who wish to use up unused sick leave. Attendance records which are a part of the record show a pattern of using two consecutive days of sick leave at frequent intervals. By using two days an employee, under the present contract language, avoids the need to furnish a "doctor's certification" as he would if he used 3 or more consecutive days.

The Union disputes the Employer's evidence of abuse contending that the employees whose records were cited as examples were indeed ill when the sick leave was taken. The Union also argues that the Employer's failure to show that such contract language is found in other collective bargaining

agreements shows that the Employer is attempting to "include new and unsubstantiated language into the agreement through arbitration. The Union believes this to be inappropriate." Finally the Union argues that the present language is adequate to deal with any problems of abuse and the proposed language is too broad.

It appears from the evidence at the hearing that some abuse of sick leave may well be taking place. I find, however, that the Employer's proposed language creates troublesome problems of interpretation. The last sentence in proposed section 9.02 may, for example, be interpreted to require proof of illness if the day before and the day after a weekend or vacation are claimed as sick days or only if two days before or two days after are claimed. This problem of interpretation is illustrative of the kind of difficulty that can be created by contract language that is imposed rather than negotiated.

CONCLUSION

I am required to evaluate the final offers in the light of the statutory criteria and choose one or the other in its entirety. I have reviewed the evidence and examined the final offers applying the legislatively mandated criteria. I find that the controlling criteria are "the interests and welfare of the public" and the "comparison of wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and condition of employment of employees performing similar services . . . in comparable communities."

The Employer has identified some significant or potentially significant problems that are appropriately dealt with in a collective bargaining agreement. The language used in its final offer, however, is neither in the best interest of the public nor comparable to language used in other collective bargaining agreements. As the preceding discussion of the

individual proposals shows, problems of interpretation are likely to cause controversy. Such controversy, perhaps leading to costly disputes, is not in the best interest of the public. The lack of evidence that comparable communities employ similar language to deal with these issues is an independent reason for rejecting the Employer's final offer. In addition it points up the problem of imposing innovative language through an arbitration award. It is apparent that the language of the Employer's final offer has not been shaped and molded by the process of collective bargaining. Too many ambiguities remain. Perhaps another round of bargaining will produce the appropriate solutions.

AWARD

It is my Award that the Union's final offer shall be and is hereby selected and shall be incorporated into the collective bargaining agreement between the parties.

Dated this 20th day of August, 1982.

Arlen Christenson
Arbitrator